



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Modern Sanitation Systems, Corp.

File: B-245469

Date: January 2, 1992

Sergio Benvenuto, Jr., for the protester,
Patrick McNally for Southeastern Enterprises, Inc., an
interested party.
William H. Campbell and A. L. Haizlip, Esq., United States
Coast Guard, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Although agency may use traditional responsibility factor, such as corporate experience, as a comparative technical evaluation factor, agency's elimination of small business offeror's proposal from the competitive range was improper where agency's rejection did not reflect a relative assessment of the proposal, but instead effectively constituted a finding of nonresponsibility.

DECISION

Modern Sanitation Systems Corp. (MSSC) protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. DTCG39-91-R-QX2001, issued by the Coast Guard, Department of Transportation, for custodial services at the Coast Guard Academy. MSSC contends that its proposal was improperly eliminated for failure to satisfy the experience requirement of the RFP when, in fact, it provided evidence of the requisite experience.

We sustain the protest.

The solicitation is for all services, material, supplies, supervision, labor, and equipment to provide specified custodial services for 16 Coast Guard Academy buildings. Award is to be made to the offeror submitting the lowest cost, technically acceptable proposal, with technical and cost factors equally important. In particular, cost was to be evaluated but not to be considered unless the minimum standards for technical capability were met. Technical

proposals were to be evaluated on the basis of three equally important technical subfactors: "corporate experience," "management/technical," and "personnel." Evaluators were instructed that a score of zero for any technical subfactor was "grounds for disqualification."

With regard to corporate experience, offerors were required to provide documentation demonstrating a minimum of 3 years successful performance of multi-year janitorial/custodial contract(s) comparable in scope to the Coast Guard Academy's Public Works Specification. In its proposal, MSSC listed two contracts under corporate experience: Picatinny Arsenal, New Jersey, October 1, 1988 through May 31, 1991 (2 years, 8 months) and Naval Air Engineering Center, Lakehurst, N.J., "August 12, 1990 to present" (July 25, 1991). MSSC received zero points for the experience requirement since the contracts listed did not satisfy the 3-year experience requirement of the RFP.

The Coast Guard notified MSSC that it had been eliminated from the competitive range because of an "uncorrectable deficiency" and then listed the corporate experience requirement, emphasizing the words "comparable in scope." When MSSC filed a protest with our Office arguing that its experience was "comparable," the Coast Guard issued a second letter advising MSSC that it had been eliminated because it did not meet the requirement for 3 years of "ongoing" corporate experience. MSSC then supplemented its protest to assert that this assessment constitutes an improper evaluation of its corporate experience. No award has been made by the agency pending resolution of the protest.

The technical subfactor on which MSSC's proposal was judged technically unacceptable--corporate experience--traditionally is considered a responsibility factor, that is, a matter relating to MSSC's ability to perform the contract. See Federal Acquisition Regulation §§ 9.104-1(c), (e); Clegg Indus., Inc., B-242204.3, Aug. 14, 1991, 70 Comp. Gen. ___, 91-2 CPD ¶ 145. While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement, see, e.g., Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292, the factors may be used only if circumstances warrant a comparative evaluation of those areas. Flight Int'l Group, Inc., 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. Otherwise, in effect, an agency, under the guise of making a technical evaluation of proposals, actually would be determining the responsibility of the offeror. Under the Small Business Act, agencies may not find that a small business is nonresponsible without referring the matter to the Small Business Administration (SBA), which has the ultimate authority to determine the responsibility of a small

business concern, 15 U.S.C. § 637(b)(7) (1988). Thus, a small business may not be found technically unacceptable under an evaluation criterion that measures a traditional responsibility factor unless the agency has performed a proper comparative evaluation/relative assessment of competing proposals under that criterion, or unless the matter is ultimately referred to the SBA for a responsibility determination. Clegg Indus., Inc., supra.

Here, the record shows that the Coast Guard did not use the responsibility-type technical evaluation criterion for the purpose of a comparative evaluation of the merits of the proposals received. Rather, proposals were found technically acceptable on a "go-no go" basis, with award to be made to the lowest cost, technically acceptable offeror. MSSC's proposal was rejected solely because of the firm's insufficient corporate experience, without regard to how the rest of its proposal was judged. In this regard we note that MSSC otherwise received a score above the minimum qualifying score set for inclusion in the competitive range.¹ Under these circumstances, the determination that MSSC was technically unacceptable was, in effect, a determination by the contracting agency that MSSC was not a responsible contractor. Therefore, MSSC's elimination from the competition without referral to SBA was improper.

Since it appears from the record that MSSC now has more than the required 3 years of experience, we recommend that the agency include MSSC in the competitive range and conduct discussions with it along with other offerors within the range. If the agency still questions whether MSSC has sufficient experience to be determined responsible, the issue should be referred to the SBA for a final

¹The establishment of such predetermined cut-off scores is not in accord with sound procurement practice. See PRC Computer Center, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD ¶ 35.

determination under its certificate of competency procedures. 15 U.S.C. § 637(b)(7); Clegg Indus., Inc., supra. We also find MSSC is entitled to the costs incurred in pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained.

Milton J. Socolar
for Comptroller General
of the United States